No. 398.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO.,
Appellant,

vs.

OTTO GROECK AND C. S. MERRILL, JR.,
Appellees.

Appellant's Brief.

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Appellant's Brief.

On April 11th 1890 the land officers of the United States issued a patent conveying to Otto Groeck the title to eighty acres of land, the equitable right to which the appellant claims was theretofore granted to it by Congress; and C. S. Merrill, Jr. claims some interest in the land under conveyance from Groeck. This suit was brought in February 1892, to right the wrong done by the land officers in patenting appellant's land to Groeck; and the court was asked to decree an implied trust as arising out of the circumstances, and

direct a conveyance from the appellees to the appellant, of the title thus wrongfully taken.

The appellees filed a plea to the appellant's bill, asserting the validity of Groeck's patent as conveying land lawfully entered by him under the pre-emption laws of the United States—and claiming that "in any event complainant (appellant), by its long delay in asserting any claim to said land, in filing its map of definite location, and in offering to select said land, is barred by its laches from asserting any claim thereto."

The appellant caused the plea to be set down for argument, and the court sustained the plea. In its opinion the Court found, in effect, that Groeck's patent had been unlawfully issued; but that, solely because of the delays suggested in the plea, the appellant was not entitled to relief.

As this is a re-hearing, and not a technical appeal, the whole case is before the court for review. Coming up as it does on the bill and plea alone, questions of *law only* are presented—for there is, and could be, no controversy as to the facts. A statement of the case, therefore, must necessarily consist of the allegations of the bill and plea.

STATEMENT OF THE CASE.

Briefly stated, in narrative form, the facts material to the present considerations, as set forth in the bill and not controverted in the plea, together with the additional facts set forth in the plea, are as follows:

The congressional Act of July 27th 1866 (14 St. 292) is, by reference, made a part of the bill (Tr. p. 4).

Section 18 of this Act authorized the appellant to construct the railroad which, localized, now extends from San Francisco by way of Mojave to Needles, on the Colorado River. To aid in the construction of this railroad, section 3 of the Act provided :

"That there be, and hereby is, granted * * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of * * * * ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title * * * at the time the line of said railroad is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office ; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of the said alternate sections."

Section 6 of the Act provided :

"That the President of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this Act."

The appellant fixed the general route of the railroad contemplated by the Act mentioned, and on January 3rd 1867 filed a map thereof in the office of the Com-

missioner of the General Land Office; and on that day the Commissioner accepted and approved the map, and the route designated by it. On March 22nd 1867 the Commissioner, under direction of the Secretary of the Interior, withdrew the odd sections of land lying within thirty miles of the line of road shown upon that map, from sale or location, pre-emption or homestead entry; but the appellant claims that upon the filing and acceptance of its map, on January 3rd 1867, the same lands were withdrawn by the self-operating force of section 6 of the Act (quoted in the next preceding paragraph), from liability "to sale or entry, or pre-emption"—and that those lands have ever since remained so withdrawn beyond the power of the Land Department to in anywise relieve them from such withdrawal (Tr. pp. 6, 14). On November 2nd 1869 the Secretary of the Interior made an order declaring the withdrawal of March 22nd 1867, revoked; on December 15th 1869 the Secretary suspended his order of November 2nd 1869; on July 26th 1870 the Secretary restored the withdrawal of March 22nd 1867; and on August 15th 1887 the then Secretary declared the withdrawal of March 22nd 1867 revoked as to the "indemnity" sections thereof (Tr. pp. 6, 7).

The appellant commenced to build its railroad during the year 1870, and completed the construction thereof, in several different sections, between that date and the year 1889; the last section thereof, extending from Huron westerly to Alcalde, having been constructed during the year 1888—and all of the road was so constructed along the line designated by the map of gen-

eral route filed, as aforesaid, on January 3rd 1867 (Tr. pp. 7, 8).

The land in suit is opposite to and co-terminous with that section of the road, as shown on the general route map and as constructed, which extends from Huron to Alcalde (constructed, as before said, during the year 1888); is within the "indemnity limits" of the appellant's grant, and not included by any exception therefrom—unless, if at all, it is excepted therefrom by Groeck's pre-emption (Tr. p. 10).

On September 2nd 1885 appellee Groeck settled on the land in suit, and during the same month filed his pre-emption claim for it in the proper land office of the United States. Thereafter Groeck complied with all land office regulations for pre-emptors, and on June 7th 1886 he made pre-emption proof and payment for the land; in pursuance of which, on April 11th 1890 a patent was issued by the Government officers conveying this land to him (Tr. pp. 21, 22). During the year 1891 Groeck conveyed an interest in the land to his co-appellee, Merrill—and they have refused to convey the land to appellant; notwithstanding they were both, at all times, familiar with all the facts set forth in the bill (Tr. pp. 12, 13, 14).

Section 4 of the Act of 1866, under consideration, provides that whenever the company

"Shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same * * * *; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a

good, substantial and workmanlike manner, as in all respects required by this Act, the commissioners shall so report under oath to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and co-terminous with said completed section of said road."

As the appellant's road was constructed, in several sections, such sections were examined by commissioners appointed by the President for that purpose; who duly reported to the President that each of such sections had been completed in a good, substantial and workmanlike manner, in all respects as required by the said Act; and the President accepted and approved the reports. The section of road betweeh Huron and Alcalde (opposite to and co-terminous with which the land in suit lies) was completed during the year 1888, a map of the definite location thereof as constructed was filed with and approved by the Secretary of the Interior on April 2nd 1889, and the President accepted and approved the commissioners' report upon that section on November 8th 1889 (Tr. pp. 7, 8, 9).

On July 13th 1891 the appellant, acting under the direction of the Secretary of the Interior, and complying with all the rules and regulations relating to the subject, selected the land in suit as granted to it by the provisions of the said Act of July 27th 1866; but the Government's officers have ever since refused to issue the appellant a patent for the land, notwithstanding its right thereto and demand therefor; and notwithstanding the appellant has not selected or received land to the

amount granted by the said Act and earned by it (Tr. pp. 11, 12).

POINTS OF CONTENTION.

It is admitted that the appellant has fully performed all the conditions essential to earn the land grant offered by the Act of July 27th 1866; that the land in suit constitutes a part and parcel of the lands granted by the indemnity provisions of that Act; and that upon selection thereof (July 13th 1891) the appellant became fully entitled to a patent for this land, except for the reasons shown in the plea.

The plea says, in effect, that Groeck made preemption settlement and filing for the land in 1885, preemption entry thereof in 1886, and that the patent which was issued in pursuance of that entry conveyed to "Groeck a perfect and legal title in fee simple, to said land." The patent, unquestionably, conveyed but the dry legal title; and whatsoever right (if any) Groeck acquired to the land, passed by virtue of the preemption entry. In other words, the validity of Groeck's patent (except as a conveyance in trust) depends wholly upon the validity of his preemption entry; and unless the land was, at the time, liable to preemption, Groeck's filing and entry were, of course, invalid. The plea, in addition to the assertion of Groeck's preemption, says that "in any event, complainant (appellant) by its long delay in asserting any claim to said land, in filing its map of definite location, and in offering to select said land, is barred by its *laches* from asserting claim thereto."

The decision of the case, therefore, depends upon the true answer to these two questions:

1st. *Was this land lawfully liable (or subject) to the preemption entry of Groeck?*

2nd. *Is the appellant's recovery barred by its delay in* (a) *definitely locating its road*, (b) *selecting the land*, *or* (c) *bringing this suit?*

Unless the first question is answered negatively, the second question is not reached.

POINTS AND AUTHORITIES.

Was the land lawfully liable to the premption entry of Groeck?

We say the land was not liable to such entry, *because it was then reserved* (a) *by law*, *and* (b) *by proclamation.*

(a) *The land was reserved by law:*

The right of preemption is extended to every person, qualified under the statute, "who has made, or hereafter makes, a settlement in person on the public lands *subject* to preemption" etc. (Sec. 2259, U. S. R. S.).

Reserved lands are not subject to pre-emption. Section 2258 of the United States Revised Statutes provides:

"The following classes of lands, unless otherwise specifically provided by law, shall not be subject to the rights of pre-emption, to wit: First—Lands included in any *reservation by* any treaty, *law*, or *proclamation of the President* for any purpose."

This land became *reserved* from preemption, as soon as the appellant's map of general route was filed and accepted (January 3rd 1867), by operation of the *law;* for Congress provided by Section 6 of the Act of July 27th 1866,

"That the President of the United States shall cause the lands to be surveyed for forty miles on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted *shall not be liable to* sale or entry, or *preemption*, before or after they are surveyed, except by said company, as provided in this Act."

This Act "is a *law* as well as a conveyance, and such effect must be given to it as will carry out the intent of Congress" (**Mo. & Kans. Co. vs. Kans. Pac. Co., 97 U. S. 497**). Section 6 of the Act of July 2nd 1864 (13 St. 365) granting lands to aid in constructing the Northern Pacific's railroad, is identical with the appellant's Act under consideration; and it is generally understood that the appellant's granting Act was copied from the Northern Pacific's. In the case of **Buttz vs. Nor. Pac. Co., 119 U. S. 55-73,** considering the force of section 6 of the Northern Pacific's Act in creating a reservation of lands by the self-operating force of the law, independently of any executive action by the land department, Mr. Justice Field, in delivering the opinion, at pages 71 and 72, said:

"The Act of Congress not only contemplates the filing by the Company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alter-

nate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from preemption, grant, or other claims or rights; but it also contemplates a preliminary designation of the general route of the road, and the *exclusion from* sale, entry, or *preemption* of the adjoining odd sections within forty miles on each side, *until the definite location is made.* The third (sixth) section declares that after the general route shall be fixed, the President shall cause the land to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or preemption, before or after they are surveyed, except by the Company. The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the Land Department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, *the law withdraws from* sale or *preemption* the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the Act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or preemption, it has been the practice of the Department in such cases, to formally withdraw them.

It can not be otherwise than the exercise of a wise precaution by the Department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless."

The quotation here made from the Buttz decision was quoted with approval and applied to the construction of section 6 of the appellant's Act (Mr. Justice Brewer delivering the opinion), in the case of the **United States vs. Southern Pac. R. R. Co., 146 U. S.**, at pages 599–600.

Considering this section 6 it was held in the case of the **Southern Pac. R. R. Co. vs. Wiggs, 14 Saw., 574–575,** as follows:

"It does not appear to me that this language is susceptible of more than one construction and that is, that no preemption right could be perfected or initiated in the face of that prohibition *till Congress sees fit to withdraw it*, while still in its power to do so, or till the whole claim of the company for deficiency is both ascertained and satisfied."

In the case of the **Southern Pac. R. R. Co. vs. Araiza, 57 Fed. Rep. 104,** after quoting with approval from the Buttz decision (supra), it is said:

"The language of the sixth section of the Acts being in substance, and almost literally, the same, the language of the Supreme Court above quoted is equally applicable to the Act in question here. If, as there held, the *law itself* withdraws from sale or pre-emption the odd section within the limits named in the grant on each side of the line of road represented by the map of general route, manifestly it withdraws from sale or pre-emption the odd sections within the limits named in the grant on each side of the line of road as fixed by the map of definite location. Such being the true construction of the statute itself, as thus

declared by the Supreme Court, it would seem to result necessarily that all the odd sections within the *indemnity*, as well as the primary limits of the grant contained in the Act of July 27th 1866, were *withdrawn from* sale or *pre-emption*, without regard to the order of withdrawal promulgated by the Secretary of the Interior."

To the same effect are the decisions rendered in the cases of the **Southern Pac. R. R. Co. vs. Orton, 16 Saw. 157**; and **Nor. Pac. R. R. Co. vs. Barnes, 51 N. W. Rep. 386.**

In the case of **Wood vs. Beach, 156 U. S. 548–551,** where the lands in suit were within the indemnity limits of the grant construed (see p. 549), Mr. Justice Brewer, delivering the opinion, at pages 550–551, said:

"These withdrawals were not merely executive acts, but the latter one, at least, was in obedience to the direct command of Congress. Section 4 of the Act granting lands to aid in the construction of what is known as the Missouri, Kansas & Texas Railway (14 St., 290) is as follows: 'Sec. 4. And be it further enacted, that as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this Act.'"

(b) *The land was reserved by proclamation:*

As before said, section 2258 provides that lands "included in any *reservation by* * * * * * law, or *proclamation* of the President," shall not be subject to pre-emption. We have shown under subject heading "(a)" that this land was not subject to Groeck's pre-emption because included in a "reservation by * * * * * law," independently of any other reservation; and we will now show that the land was

not subject to Groeck's pre-emption because "included in a *reservation by* * * * * * *proclamation of the President.*"

On March 22nd 1867 the Commissioner of the General Land Office withdrew this land from preemption, under direction of the Secretary of the Interior made three days before. The withdrawal thus made (we claim, it must be remembered, that a *legislative withdrawal* by the self-operating force of section 6 of the Act *as a law*, took effect on January 3rd 1867, and has remained in force continuously since, beyond the power of the land officers to affect it by their orders) has continued in force ever since, except in so far as interrupted by orders of the Secretary of the Interior made on November 2nd 1869 revoking it, on December 2nd 1869 and July 26th 1870 setting aside the revocation and restoring the original withdrawal, and on August 15th 1887 (two years after Groeck's filing and one year after his entry) revoking the original withdrawal. So that, in any event, the *executive withdrawal* of this land (as well as the legislative) was in full force from March 22nd 1867 to November 2nd 1869, and from December 11th 1869 to August 15th 1887 (Tr. pp. 6, 7); and as Groeck filed in 1885 and made his preemption entry in 1886 (Tr. 22), this land was *reserved* from liability to preemption when he sought to preempt it, by *executive* as well as *legislative withdrawal*—provided the executive withdrawal, like the legislative, was effective, independently considered.

The withdrawal order made on March 19th 1867 by the Secretary of the Interior, is the legal equivalent,

within the meaning of section 2258 of the Revised Statutes, of a "reservation by * * * * proclamation of the President"; and this land was as effectively withdrawn by the order of the Secretary as if the order had been signed by the President instead of the Secretary. In the case of **Wood vs. Beach, 156 U. S. 548–551**, considering a similar withdrawal made by the Secretary, and construing this section 2258, it was held:

"The fact that the withdrawals were made by order of the Interior Department, and not by proclamation of the President, is immaterial." (And see cases there cited.)

In the case of **Bullard vs. Des Moines R. R. Co., 122 U. S. 167–176**, the Secretary of the Interior, without special authority, made a purely executive order withdrawing a large area of land in Wisconsin from preemption, to preserve the land from other disposition, for the benefit of a railroad grant which it was believed Congress intended to make; but the withdrawal was made *in advance* of any legislation upon the subject, in aid of a grant which, when thereafter made, contained no express provision for withdrawal. Bullard settled on the land after the executive withdrawal, but before the Act was passed granting the land to the railroad company for which it was withdrawn. After finding that the withdrawal order was made on May 18th 1860, the preemption settlement made in May 1862, and the congressional grant made on July 12th 1862, the court, in deciding the case, at page 176, said:

"If the lands were, at the times of these settlements and preemption declarations, effectively withdrawn from

settlement, sale or preemption by the orders of the Department which we have considered, there is an end of the plaintiff's title; for by that withdrawal or reservation the lands were reserved for another purpose, to which they were ultimately appropriated by the Act of 1862, and no title could be initiated or established, because the land department had no right to grant it. This proposition, which we have fully discussed, will be found supported by the following decisions, which are decisive of the whole controversy." (And then follows a long list of decisions.)

In the case of **Hamblin vs. Western Land Co., 147 U. S. 531–537,** the railroad was definitely fixed, and the land grant identified and finally located so as it could not be changed without the consent of Congress, by the filing and acceptance of a map of definite location on August 30th 1864; but on September 2nd 1869 another map of definite location was filed, along a different route, and the Interior Department, without authority, withdrew the lands along the line of the new route—which withdrawal did, but the other did not, include the land in suit. Speaking of the effectiveness of this unauthorized and *purely executive withdrawal*, the opinion says (at pages 536–537):

"In the first place, whether the location of the line in 1869 was of any validity or not, it was in fact accepted by the Land Department, and by the letters of March 15 and May 11, 1870, the land in controversy was, with others, withdrawn to satisfy the grant as determined by that location, and such a reservation by the Interior Department, it is well settled, operates to withdraw the land from entry under the preemption or homestead laws. Wolcott v. Des Moines Co., 5 Wall. 681; Wolsey v. Chapman, 101 U. S. 755; Bullard v. Des Moines & Fort Dodge Railroad, 122 U. S. 167; United States v. Des Moines Navigation &c. Co., 142 U. S. 510. As therefore the land was so situated

that Hamblin could not make a valid homestead entry, it follows that he is not in a position to question the conveyance of the legal title by the patent from the government."

Is the appellant's recovery barred by its delay in (a) definitely locating its road, (b) selecting the land, or (c) bringing this suit?

Delay, without injury, is not a bar:

Laches is not like limitation, a mere matter of the passage of time, but principally a question as to whether it would be inequitable to enforce the claim because of some change in the condition of the property or relations of the parties, occasioned by the delay (**Galligher v. Caldwell, 145 U. S. 368–A. & E. Enc. of Law, Vol. 12, pp. 540–542**). Where delay has worked a wrong to the adverse party, who has thereby been induced to do or abstain from doing something, he who has occasioned the wrong is denied the relief on the grounds that his delay, under such circumstances, is a bar for laches; but so long as the relative position of the parties remains the same, and the adverse party is not directly prejudiced by the lapse of time, delay is of no consequence to equity (**A. & E. Enc. of Law, Vol. 12, p. 544**).

The appellee's claim is barren of equities, and unless the appellant's delays operate, *per se*, as positive bars to this Court's jurisdiction over the case, the plea must be denied. Groeck's pre-emption was invalid from the beginning, because the land was not subject to pre-emption—and time cannot make it valid, nor affect it in any way; nor, in this case, do any aiding presumptions

flow from the patent issued in pursuance of that invalid entry. Presumably Groeck placed some improvement, not alleged to have any value, upon the land, and resided there from September 1885 to July 1886—just long enough to enable him to make the land-office proof essential to the accomplishment of his fraud; but beyond this he has not occupied the land, nor made expenditures for improvements. Besides, notice of such occupancy, or of the pre-emption entry, was not brought home to the appellant; but the entry was made before the appellant's rights had ripened into an actionable title—and, with notice, the appellant was not bound to act, because it was powerless to. The appellant accepted the grant, complied with the condition of the owner's offer by establishing its general route and filing a map thereof, and the law preserved the land from the effect of the invasion of trespassers, pending construction of the road, without further diligence of appellant. Groeck made his entry, and Merrill purchased, with full knowledge of the appellant's equities (Tr. pp. 14, 15); and being in the position of purchasers with knowledge of a prior equitable claim, they can not, in any event, be heard to assert laches for *delays of shorter time than the statutes of limitation* (**Conn. Gen. Life Ins. Co. v. Eldridge, 102 U. S. 545**).

An understanding of the significance of the appellant's granting Act, and the nature of the grant of indemnity lands made by it, will clearly show that while the delays complained of subjected the appellant to liability of forfeiture for breach of condition in time as

between the Government and it, they are matters of no concern to the appellees.

The nature of appellant's grant :

The grant is conferred by the words "That there be, and hereby is, granted"; words which have been uniformly construed to make an *immediate transfer* of the right and title intended to be granted, in lands to be thereafter identified. The lands to which the right and title is thus transferred *in proesenti*, are designated in the Act as odd sections to be found in defined limits on each side of the road when definitely located; but when identified, the right and title granted having been transferred *in proesenti*, the grant takes effect, by relation, as of the date of the Act—and cuts off all intermediate claims, not specifically excepted from the grant. In other words, the effect of identification is to write into the grant a particular description of the lands; and thereupon the grant is to be read as if it contained such particular description at the time of its passage. The rule laid down in **Van Wyck v. Knevals, 106 U. S. 360-370**, has been followed, uniformly since—wherein it was said, at page 365:

"The grant is one *in proesenti* * * * *; that is, it imports the transfer, subject to the exceptions mentioned, of a *present interest in the lands* designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of indentification until the route is definitely fixed. When that route is thus established the grant takes effect upon the sections by relation as of the date of the Act of Congress. * * * * It cuts off all claims, other than those

mentioned, to any portion of the lands from the date of the Act, and passes the title as fully as though the sections had then been capable of indentification."

The appellant constructed its road during the year 1888, and the map showing the definite location thereof was filed and accepted on April 2nd 1889 (Tr. pp. 8, 9). Until the last mentioned date the lands granted remained unidentified ; but from January 3rd 1867, when the map of general route was filed, the lands had remained withdrawn; continuously, by section 6 of the Act—and were no more liable to preemption before than after, nor after than before, definite location (**Buttz v. Nor. Pac. R. R. Co., 119 U. S. 71**). Which illustrates that the delay, if delay there was, in nowise injured the appellants, nor altered the status of their relations with either the land or the appellant. It is true the Government might have declared *forfeiture* for *breach of condition* in time of construction ; but the government *accepted* the road as constructed, and *approved* the map of location when filed. Construction and definite location stand, therefore, as made within the time conditioned by the granting Act ; and there having been no breach of condition there was no delay—and without delay there could not have been laches. From which it follows, that if the appellant has been guilly of laches, it must be for delays since April 2nd 1889, the date its map of definite location was filed and accepted ; and it will be remembered that this suit was brought on February 12th 1892—within three years after the lands granted were identified by definite location, and within two years after (April 11th 1890) the date of Groeck's

patent. As before shown, the appellees having purchased with knowledge of the appellant's prior equity can, under no circumstances, plead the bar of laches for a delay shorter than the period prescribed by the statutes of limitation ; and the period of our statute is four years (Sec. 343, C. C. P.). This suit was, therefore, brought in time had a right of action affording adequate relief accrued on April 2nd 1889, the first day the lands granted became capable of identification ; but the wrong sought to be remedied was done on April 11th 1890, by the issue of the patent—and, as before said, this suit was brought within two years after that date.

Definite location of the road, on April 2nd 1889, identified the lands transferred by the *proesenti* grant made by the Act ; so that, read on the day of definite location, the Act constituted a conveyance as of its date, of such right or title to the identified lands, as Congress intended to grant.

It is settled law that the Act under consideration granted a legal title to the odd sections within the primary limits of the road, which attached, upon definite location, as of the date of the Act (**U. S. v. S. P. R. R. Co., 146 U. S. 570—Deseret Salt Co. v. Tarpey, 142 U. S. 248**); but as to the lands within the *indemnity limits* it granted a preference right to select the identified lands. The grant to the Atlantic & Pacific Company as well as that to the appellant, was made by the same sections (3 and 6) of the Act under consideration ; so that a construction of those sections for the Atlantic & Pacific grant is necessarily a construction of them for the

appellant's grant. Considering the nature of the right or title conferred by this Act at the date of definite location, and before selection, in the case of the **United States v. Colton Marble and Lime Co., 146 U. S.**, at pages 617 and 618, the opinion says:

"It might well be assumed that very likely the Atlantic & Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency in the granted limits. The right of selection was a prospective right, and if it was to be fully exercised no adverse title could be created to any lands within the indemnity limits. * * * * In fact every withdrawal of lands from the aggregate of those from which selection could be made, would more or less impair the value of selection. * * * * That prospective right would be impaired by the transfer of the title of a single tract."

In the case of the **S. P. R. R. Co. vs. Wiggs, 14 Saw. 568**, construing the indemnity provisions of the Act now under consideration, Judge Sawyer said:

"In this case the *right to select* in the future, this land, in the part limited for that purpose, *vested*, should there turn out to be a deficiency, on filing the map of definite location, thereby fixing the limit of the district for selection, although no *title* to the land vested till selection. * * * * The right to select at once vests, though the title to specific lands does not till selection is made."

In the case of **Nor. Pac. R. R. Co. vs. Barnes, 51 N. W. Rep. 401**, construing a grant almost identical with the plaintiff's here, it was held:

"The *indemnity lands* are, therefore, *granted equally with the place lands* within the forty-mile limits, by this Act. They are of the 'amount of twenty sections per mile' granted, and the words 'there be, and hereby is, granted'

apply to them, and pass the title. The only distinction between the two classes of land is the method by which they are identified. Once identified, the company has the same title to the one as to the other. The indemnity provision does not make an additional grant, but simply points out the method by which lands already granted may be identified."

Considering the same grant the Circuit Court of Appeals, in the case of the **Nor. Pac. R. R. Co. vs. Amacker, 1 C. C. A. 348–9,** held as follows:

"The land grant of the Northern Pacific Railroad Company, under the Act of July 2, 1864, was a grant of quantity to the extent of twenty alternate sections per mile on each side of the line of road through the territories of the United States, and ten alternate sections of land on each side of the road whenever it should pass through a State. * * * * The grant was, therefore, not only one of quantity, but it was also in the nature of a float, to be located within the limits of certain exterior boundaries containing such a number of odd numbered sections as would enable the company to obtain by selection within such exterior boundaries, the full quantity of land granted."

As said in the Barnes case (51 N. W. Rep. 401), "The indemnity provision does not make an additional grant, but simply points out the method by which lands already granted may be identified." The Act *transferred.* as of its date, a *present* or immediate interest in a specified quantity of land designated by general description, and upon the filing of the map of general route withdrew those lands from liability of disposal otherwise than to the appellant, pending particular identification of the lands. No selection of the lands in the primary limits being required, identification is completed by definite location alone; and so it is said

that the *title granted* and the *lands granted* are brought together by definite location. As it could not be known at the date of the grant whether all, or what portion, of the indemnity lands would be required to supply the deficiency of quantity because of prior disposition in the primary limits, the Act requires that the indemnity lands "be selected under the direction of the Secretary of the Interior;" and it is well settled by the decisions that until, after definite location, such selection is made, the right or title to any particular tract of indemnity land remains inchoate. The corresponding provision in some of the railroad land grants is that the indemnity lands be selected "subject to the approval of the Secretary of the Interior;" and in construing those grants it has been held that the grantee's title to a particular tract is not specific until, after definite location and selection, the selection is approved by the Secretary. In the case of **Chicago Ry. Co. vs. Sioux City Ry. Co., 3 McCrary's Reports at page 300,** it was held:

"The lands in place and the indemnity lands were granted by Congress for precisely the same purpose. The intention of the grantor with respect to them was exactly the same. The mode of making the title of the trustee specific was different, but when that title became certain in the trustee by the location of the definite line in one case, and by selection in the other, it was the duty of the trustee to apply the two kinds of land to precisely the same trust."

In **Wis. Cent. R. R. Co. v. Price Co., 133 U. S. 496,** it was held (syl.):

"5. The title conferred by the grant was imperfect until the land was indentified by the location of the road;

but when the route of the road was fixed, the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims.

9. No title to the indemnity lands becomes vested in any company until the selections are made, and they have been approved of, as provided by the statute, by the Secretary of the Interior; until which time such indemnity lands are not subject to taxation."

The Wisconsin Central case was decided along the principle that lands became subject to taxation at that stage of title when the restrictions upon possession are removed; and it was held that the restrictions were removed at definite location as to the primary lands, but not until approved selection as to the indemnity lands. It follows, therefore, that the appellant had no action at law before selection—and until the patent issued to Groeck it had no actionable equitable right. Until the road was definitely located (April 2nd 1889) appellant was not entitled to select this land, because it was not identified; and it applied to select it on July 13th 1891. But had the selection been made on the earliest day permissible (April 2nd 1889) this suit, brought on February 12 1892, was in time; which, in connection with the fact that Groeck's entry upon which the patent depends was made before the appellant could have selected, demonstrates that it is of no consequence to the appellees' claim whether the selection was delayed or not.

The rejection of appellant's list immaterial:

On July 13th 1891 the appellant, acting "under the direction of the Secretary of the Interior," selected the

land in suit (Tr. p. 11); but the plea says that the selection was rejected by the local land-officers and the Commissioner. The bill and plea in this case and in the case of the **Southern Pac. R. R. Co. v. Smith**, are identical as to their allegations about the Company's right to select, its application to select, and the rejection thereof—except here the plea says the selection was rejected by the local land-officers and the Commissioner, and in the Smith case the corresponding allegation of the plea was that the Secretary of the Interior rejected the selection. The two cases were argued together, and decided on the same day. As to the effect of the application to select, and its rejection, it was held in the Smith case **(74 Fed. Rep., 591)**:

"The plea further alleges that from March 3, 1871 to October 3, 1887 the complainant did not select, or apply to select, the lands involved in this suit, as indemnity lands, under the direction of the Secretary of the Interior, or otherwise; and the defendants deny that the Secretary of the Interior approved the complainant's application to select the lands in controversy, and allege that he rejected the same. * * * * The lands in controversy being within the indemnity limits of the complainant's grant, and being at the time of attempted selection vacant and unappropriated, to which the United States had full title, and not fully within any exception to the grant, and the complainant having done all in its power to select them by filing in the proper land office its claim to them in due form, accompanied by the affidavits and certificates required by law, and paying the proper fees, I think it clear that it is entitled to maintain the present bill."

Even in cases where, under the provisions of the granting Act, the Secretary's *approval* is required, he

can not act capriciously; and (in equity) the right to approval is equivalent to approval—for "equity looks on that as done which ought to have been done."

The following quotations are copied from the citation notes on page **641, Vol. 1, Am. & E. En. of Law,** under the title "**Approve**" etc.:

"Even if the phrase '*approved bill*' were introduced, I think it could only mean a bill to which no reasonable objection could be made, and which *ought to be approved.* (Hodgson vs. Davies, 2 Campbell 530)."

"So where one agrees to execute to another a note with 'good and approved freehold surety' the latter can not arbitrarily refuse the surety; it is sufficient if the surety be good freehold surety, *worthy of approval.* (Andis vs. Personett, 9 N. E. Rep. 101)"

"On a sale for 'approved' indorsed paper, the construction of the law is, paper which *ought to be approved.* (Guier & Diehl vs. Page, 4 S. & R. (Pa.), I)"

On such sale the burden of proof is thrown upon the vendee to show that it was such a note as the vendor *ought to* have received and approved. (Mills vs. Hunt, 20 Wend. (N. Y.) 431)"

In the **Wiggs case**, cited supra, the plaintiff's selection was presented after the Government patented the land to Wiggs, and the selection was rejected by the Register and Receiver when presented. The List was in the required form for such selections, and accompanied by the requisite fees. Speaking of this selection Judge Sawyer, at page 570 (**14 Saw.**), said that the Company had thus "selected the lands so far as it could make a selection without the concurrence of the department."

(a) *As to delay in definite location:*

The Government, the vendor under the contract, accepted and approved the road as constructed in time, and the map as filed in time—and, therefore, there was no delay; but even had the road not been constructed at all, nor the map filed, it would be of no consequence to the appellees. **In Van Wyck v. Knevals, 106 U. S. 368-9,** where that portion of the road opposite the land in suit had not been constructed at all, it was said:

"If the whole of the road has not thus been completed, the forfeiture consequent thereon can be asserted only by the *grantor*, the United States through judicial proceedings, or through the action of Congress (Schulenberg v. Horriman, 21 Wall. 44). A *third party* can not take upon himself to enforce conditions attached to the grant, when the Government does not complain of their breach."

But, as before when shown, this land was *reserved from all liability to Groeck's claim*—and his relations and conditions were in nowise affected by the location, whenever made.

(b) *Was the selection in time?*

This land was reserved, and not subject to Groeck's preemption, even though *no selection* had been made. As said by Judge Sawyer, construing this grant in the case of the **Southern Pac. R. R. Co. v. Wiggs, 14 Saw. 574:**

"It does not appear to me that this language is susceptible of more than one construction, and that is that no preemption right could be perfected or initiated in the face of that prohibition until *Congress sees fit to withdraw it*, while still in its power to do so, or till the whole claim of the company for deficiency is both ascertained and satisfied.

As Congress did not see fit to put *any limitation upon the time for selection*, neither the Secretary of the Interior nor the Courts are authorized to prescribe such limitation."

This is evidently the view of the United States Supreme Court—for it is remarked in **U. S. v. Colton M. & L. Co., 146 U. S. 618**, distinguishing between the nature of the grantee's rights to the primary and indemnity lands, that:

"It must be borne in mind that these lands were in the granted limits of the Southern Pacific, and that they were not lands in respect to which that company would have a right of selection, *and might defer the exercise of that right until such time as suited it.*"

(c) *This suit was brought in time:*

The appellees, having bought with knowledge of appellant's prior equity, can not complain (if at all) of any period shorter than that prescribed by the statutes of limitations—and the shortest statute applicable is four years. Until selection the appellant had no actionable right; nor could adequate relief be obtained until the patent issued to Groeck. The suit was brought in less than three years after definite location, in less than three years after the earliest date at which the land could have been selected, in less than two years after Groeck's patent issued, and in less than one year after selection.

Respectfully submitted,

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